BRB No. 02-0872 BLA

RAYMOND KERSHETSKY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LEHIGH COAL & NAVIGATION COMPANY	)	
	)	
	)	
and	)	DATE ISSUED: 09/15/2003
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the August 22, 2002 Decision and Order on Remand (98-BLA-0520) of Administrative Law Judge Ralph A. Romano reinstating his April 16, 1999 award of benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine

Health and Safety Act of 1969, as amended, 30 U.S.C. '901 *et seq*. (the Act).[1] This case is before the Board for the third time. Most recently, the Board, in *Kershetsky v. Lehigh Coal & Navigation Co.*, BRB No. 01-0601 BLA (Mar. 22, 2002)(unpublished), vacated the administrative law judge's Decision and Order and remanded the case. The Board held that the administrative law judge did not provide adequate rationale for two rulings, as required by the Administrative Procedure Act (APA), 5 U.S.C. '557(c)(3)(A), as incorporated into the Act by 5 U.S.C. '554(c)(2), 33 U.S.C. '919(d) and 30 U.S.C. '932(a). Specifically, the Board instructed the administrative law judge on remand to reconsider his decisions to overrule employer=s objection to the admission of Claimant=s Exhibits 5 and 7 and to deny employer=s request for time within which to submit interpretations of the x-rays dated August 7, 1997 and March 5, 1998, to rebut those contained in Claimant's Exhibits 5 and 7. The Board also held that the administrative law judge did not fully explain his rationale for excluding from the record Dr. Levinson's June 30, 1998 deposition testimony.

On remand, the administrative law judge explained, and expanded upon, his rationale in overruling employer's objection to Claimant's Exhibits 5 and 7 and denying employer's request for time within which to submit additional x-ray interpretations to rebut those contained in Claimant's Exhibits 5 and 7. Additionally, the administrative law judge clarified his reasoning underlying his decision to exclude from the record Dr. Levinson's deposition transcript.

On appeal, employer contends that the reasons that compelled the Board to remand this case to the administrative law judge two times previously require a remand of the instant case. Employer argues that the administrative law judge again failed to follow the Board's remand instructions and abused his discretion by admitting into the record Claimant's Exhibits 5 and 7 without affording employer the opportunity to submit rebuttal evidence and by excluding from the record Dr. Levinson's deposition testimony. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a brief in the appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Administrative Law Judge's Decision to Overrule Employer's Objection to the Admission of Claimant's Exhibits 5 and 7 and to Deny Employer's Request for Additional Time Within Which to Submit Rebuttal Evidence

Employer contends that Claimant's Exhibits 5 and 7 should be excluded from the record unless employer is given the opportunity to submit additional x-ray interpretations to rebut those contained in Claimant's Exhibits 5 and 7. The Board, in *Kershetsky*, held that in overruling employer's objection to the admission of Claimant's Exhibits 5 and 7, which contain a total of seven readings of the x-ray films dated August 7, 1997 and March 5, 1998, the administrative law judge merely reiterated his initial reasons for doing so, which the Board had ruled were improper. *Kershetsky*, slip op. at 4. The Board also noted that, contrary to the administrative law judge's finding, employer, in a letter sent to the administrative law judge prior to the hearing, had indicated that the several attempts it made to obtain the x-ray films dated August 7, 1997 and March 5, 1998 were not successful. *Kershetsky*, slip op. at 4-5. The Board held that because the administrative law judge failed to provide adequate rationale for his rulings, it vacated the administrative law judge's decision to overrule employer's objection to the admission of Claimant's Exhibits 5 and 7 and his decision to deny employer's request for time within which to submit rebuttal evidence. *Kershetsky*, slip op. at 5.

On remand, the administrative law judge indicated that he found employer's stated basis for the objection, namely that employer's counsel wanted the opportunity to submit interpretations of the x-rays dated August 7, 1997 and March 5, 1998 which would equal in number those submitted by claimant, was not a valid basis for objecting to the admission of evidence in an adversarial proceeding. The administrative law judge also found that employer had not timely objected to the admission of Claimant's Exhibits 5 and 7. Further, the administrative law judge determined that while employer had informed him of its fruitless attempts to obtain the August 7, 1997 and March 5, 1998 x-ray films, employer's counsel should have, as a result, filed a motion to compel production, which he never did. The administrative law judge explained that employer had not filed a motion to compel production when it had an opportunity to do so, namely after the notice of hearing issued on April 15, 1998 and before the hearing was held on July 23, 1998.

Employer argues that the administrative law judge again failed to provide adequate rationale in support of his decision to overrule its objection to the admission of Claimant's Exhibits 5 and 7, and merely restated the bases he previously provided and that the Board rejected as inadequate. Employer requests that the Board vacate the administrative law judge's decision to admit into the record Claimant's Exhibits 5 and 7, and urges the Board to remand the case for reassignment to a new administrative law judge.

Employer's contentions lack merit. The administrative law judge on remand clarified his finding that employer's counsel did not persuasively support either his objection to the

admission of Claimant's Exhibits 5 and 7 or his request for time within which to submit rebuttal evidence. The administrative law judge determined, within his discretion, that employer's counsel's desire for an opportunity to submit interpretations of the x-rays dated August 7, 1997 and March 5, 1998 that would equal in number those submitted by claimant, was not a proper basis for his objection to the admission of Claimant's Exhibits 5 and 7. The administrative law judge also found that employer's counsel had made a tactical error by not filing a motion to compel production of the x-ray films, given claimant's counsel's failure to respond to employer's requests for the films.[2] The administrative law judge thereby provided a rational basis for his rulings.[3] *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984).

Further, employer contends that the administrative law judge's denial of its request for an opportunity to submit rebuttal evidence prevents employer from fully defending the case because the x-ray readings contained in Claimant's Exhibits 5 and 7 "represent the first time that any radiologically qualified physician diagnosed pneumoconiosis." Employer's Brief at 16. We reject employer's argument. While an administrative law judge has a duty to insure a full and fair hearing on all issues, *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987)(*en banc*), this duty does not relieve a party of its obligation to submit evidence in a timely and proper manner pursuant to the regulation at 20 C.F.R. §725.456. Moreover, employer chose to select Dr. Goodman, a B reader, and Dr. Levinson, an A reader, as its medical witnesses.

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[2] The administrative law judge incorrectly found that Claimant's Exhibits 5 and 7 "indicate that the two chest x-rays were provided to employer on June 29, 1998 and June 30, 1998, respectively." August 22, 2002 Decision and Order on Remand at 3 (emphasis added). Rather, Claimant's Exhibits 5 and 7 show when those x-ray readings were exchanged by claimant and submitted to the administrative law judge. Further, the administrative law judge incorrectly considered whether employer's counsel established "good cause" as to why "his interpretations" had not been exchanged in accordance with 20 C.F.R. §725.456(b)(1). August 22, 2002 Decision and Order on Remand at 3. In fact, employer *did not submit* any late x-ray interpretations. Rather, employer *sought the opportunity to submit* additional x-ray interpretations outside the twenty-day rule. The administrative law judge's error is harmless as it does not affect the outcome of the case. *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988). We thus need not address employer's arguments challenging the administrative law judge's findings in this regard.

[3] Employer obtained Dr. Goodman's September 22, 1997 reading of the x-ray dated August 7, 1997, and submitted it to the administrative law judge on October 2, 1997. Director's Exhibit 18. Dr. Goodman is a B-reader. Id. The March 5, 1998 x-ray was taken by Dr. Levinson, an A reader, who is employer's medical witness. The record thus reflects employer's previous access to both x-ray films.

Administrative Law Judge's Decision to Exclude From the Record Dr. Levinson's Deposition Testimony

Employer contends that there is no valid basis for excluding from the record Dr. Levinson's deposition testimony. The Board, in *Kershetsky*, held that the administrative law judge had not sufficiently explained why he excluded the transcript of Dr. Levinson's deposition after admitting that claimant's counsel's October 1, 1998 correspondence to the administrative law judge protesting her non-receipt of the transcript was "particularly misleading" and "nothing less than irresponsible and unbecoming of a lawyer." *Kershetsky*, slip op. at 7.

On remand, the administrative law judge indicated that Dr. Levinson's deposition testimony, which employer had not timely submitted, was admitted into evidence at the July 23, 1998 hearing because employer's counsel agreed to provide claimant's counsel with a copy "as quickly as possible," as directed by the administrative law judge. Hearing Transcript at 19. The administrative law judge then chronicled claimant's counsel's subsequent filings with the administrative law judge in which she protested her non-receipt of Dr. Levinson's deposition transcript, as well as the Board's consideration of these filings and the impact of these filings on claimant's continued objection to the admission of Dr. Levinson's deposition testimony. The administrative law judge explained:

> While it is now clear that Claimant's counsel misrepresented the fact of her non-receipt of the transcript in her letters and motion, this had no bearing on my initial ruling. Despite the BRB's assertion, the transcript was not excluded, because "employer did not notify the administrative law judge that, notwithstanding claimant's letters to the contrary, he had sent the transcript to claimant." *Kershetsky*, BRB No. 01-0601 BLA at *6. Rather, the transcript was excluded, because Employer's counsel failed to comply with a directive to provide Claimant with a transcript "as quickly as possible." (Tr. @ 19.)

August 22, 2002 Decision and Order on Remand at 5. The administrative law judge on remand recognized that it had been established previously, while the case was pending before the Board, that claimant's counsel was in receipt of the transcript on September 2, 1998. The administrative law judge found that employer's counsel had thereby failed to comply with the administrative law judge's directive at the July 23, 1998 hearing to provide claimant with a copy of Dr. Levinson's deposition testimony "as quickly as possible." Hearing Transcript at 19. The administrative law judge next explained that employer's counsel had failed to submit Dr. Levinson's deposition testimony in compliance with the twenty-day rule provided at 20 C.F.R. §725.456(b)(1) and had failed "to cure his failure" to do so by complying with the administrative law judge's directive. The administrative law judge stated:

> Having not provided Claimant with the transcript until September of 1998, over a month after my directive, the Employer tested my discretionary ruling admitting his evidence. Employer never complied with the 20-day rule and made a lack luster effort to make a showing of "good cause" by waiting over a month to finally sent the transcript to Claimant.

August 22, 2002 Decision and Order on Remand at 5-6. The administrative law judge thus excluded from the record Dr. Levinson's deposition testimony.

Employer argues that the administrative law judge did not make the admission of the transcript from Dr. Levinson's deposition contingent on employer providing claimant with a copy by a certain date. Employer notes that claimant's counsel participated in the deposition and asserts that she could have requested a copy of the deposition transcript directly from the transcription agency.

Employer's contentions lack merit. On remand, the administrative law judge reasonably explained that Dr. Levinson's deposition testimony was excluded from the record because employer's counsel failed to comply with the administrative law judge's directive, issued at the hearing, to provide claimant with a copy of the transcript "as quickly as possible," Hearing Transcript at 19. August 22, 2002 Decision and Order on Remand at 5. The administrative law judge further properly found that employer had not complied with the twenty-day rule provided at 20 C.F.R. §725.456(b)(1) and determined, within his discretion, that employer's counsel "made a lack luster effort to make a showing of 'good cause' by waiting over a month to finally send the transcript to claimant." August 22, 2002 Decision and Order on Remand at 5. Substantial evidence supports the administrative law judge's determination. Specifically, the administrative law judge issued his directive at the July 23, 1998 hearing and employer sent claimant a copy of Dr. Levinson's deposition testimony on September 2, 1998, more than five weeks later. We thus hold that the administrative law judge acted within his discretion by finding that this lapse by employer's counsel constituted a failure to comply with the administrative law judge's directive and provided a basis upon which the administrative law judge could properly exclude from the record Dr. Levinson's deposition testimony. APA, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Based on the foregoing, we hold that the administrative law judge's analysis on remand comports with the requirements of the APA, which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. *Id.* We thus affirm the administrative law judge's decision to admit into the record Claimant's Exhibits 5 and 7 and to deny employer's request for time within which to submit rebuttal evidence. We also affirm the administrative law judge's decision to exclude from the record

Dr. Levinson’s deposition testimony.

Accordingly, we affirm the administrative law judge's August 22, 2002 Decision and Order on Remand in which the administrative law judge reinstated his April 16, 1999 award of benefits.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge